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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FLORIDA CABLE
TELECOMMUNICATIONS ASSOCIATION,
INC., COX COMMUNICATIONS GULF
COAST, L.L.C., *et. al.*

Complainants,

v.

GULF POWER COMPANY,

Respondent.

RECEIVED

JUL 11 2005

Federal Communications Commission
Office of Secretary

E.B. Docket No. 04-381

**COMPLAINANTS' MOTION TO COMPEL
GULF POWER COMPANY'S RESPONSES TO
INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS**

The Florida Cable Telecommunications Association, Inc., Cox Communications Gulf Coast, L.L.C., Comcast Cablevision of Panama City, Inc., Mediacom Southeast, L.L.C., and Bright House Networks, LLC ("Complainants"), by their attorneys and pursuant to 47 C.F.R. §§ 1.323(c) and 1.325(a)(2) and this Court's Orders dated April 25, 2005 and May 20, 2005¹, respectfully submits its Motion to Compel Responses to Interrogatories and Responses to Requests for Production of Documents from Respondent Gulf Power Company ("Gulf Power").

INTRODUCTION

On February 1, 2005, Complainants served their First Set of Interrogatories, Exhibit A hereto, and its First Set of Requests for Production of Documents on Gulf Power, Exhibit B hereto. Gulf Power's responses to both Complainants' Interrogatories and Document Requests were originally due on March 3, 2005. On March 1, 2005, Gulf Power filed an unopposed motion for an

¹ See FCC Order 05M-25 (rel. Apr. 25, 2005) and FCC Order No. 05M-27 (rel. May 23, 2005). Counsel for Complainants designated for copying some 1400 pages of documents and maps while at Gulf Power's Pensacola headquarters on May 27 and 28, 2005 and received the documents on June 27. By the terms of the Court's Orders, Complainants were given 14 days from receipt, or until July 11, within which to file this Motion to Compel.

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extension of time, seeking two additional weeks, or until March 17, 2005 to respond to Complainants' discovery requests. On March 16, 2005, however, after the close of business, counsel for Gulf Power notified Complainants' counsel that it was not planning to provide responses to Complainants' requests on March 17th. The Presiding Judge conducted a conference call on March 17th and directed Gulf Power to file a second motion for extension of time on March 23rd. On March 23, 2005, Gulf Power filed its second motion for extension of time, seeking approximately one additional month, or until April 15, to answer Complainants' discovery requests. In this motion, Gulf Power represented that it "believe[d] that an April 15, 2005 discovery deadline would allow sufficient time to respond to Complainants' discovery." On April 1 the Presiding Judge granted Gulf Power's motion, directing it to file its discovery responses on April 18, 2005.

On April 18, 2005, two and one half months after Complainants served their discovery requests, Gulf Power served its responses to Complainants' Interrogatories, Exhibit C hereto, and to Complainants' Document Requests, Exhibit D hereto. Gulf power provided approximately 2000 pages of documents and indicated that approximately ten or more "bankers' boxes" of documents would be made available for review in Gulf Power's offices in Pensacola and additional documents in other offices throughout Gulf Power's service area in Northern Florida.

On May 26 and 27 Complainants' counsel reviewed the additional documents in Gulf Power's offices in Pensacola and designated approximately 1400 additional pages for review. These documents were received by Complainants' counsel on June 27, 2005. Notwithstanding this additional production and review, as set forth in detail herein below, Gulf Power's responses are substantially incomplete and require Complainants to file this motion to compel.²

² Indeed, as will become evident below, Gulf Power's inadequate discovery responses and its utter failure to substantiate the claims it made in January 2004 (in its "Description of Evidence Gulf Power Seeks To Present In Satisfaction Of The Eleventh Circuit's Test") make manifest that Gulf Power lacks the evidence to mount even a *prima facie* case and that a briefing schedule for a motion to dismiss should be established immediately.

BACKGROUND FACTS AND PROCEDURAL HISTORY

This case concerns Gulf Power's claim that it is entitled, under the Fifth Amendment of the United States Constitution, to demand a "just compensation" annual pole attachment rate that would be several times higher than the total compensation it already receives from Complainant cable operators in the form of the pole make-ready payments made prior to attaching and the annual pole rental it receives under the Federal Communications Commission's ("FCC" or "Commission") Cable Formula, which is calculated pursuant to the Commission's regulations, 47 C.F.R. §§ 1.1401 *et seq.*

Complainants' filed their complaint in this matter against Gulf Power on July 10, 2000, alleging that Gulf Power violated section 224 of the Communications Act and the Commission's pole attachment rules by unilaterally terminating its existing pole attachment agreements with Complainant cable operators, forcing the cable operators to execute new pole attachment agreements that contained pole attachment rates several times higher than allowed under Commission regulations, and refusing to renegotiate new rates in good faith in accordance with the Cable Formula. On May 13, 2003, the Commission's Enforcement Bureau granted the Complaint, finding, *inter alia*, that the Cable Formula provides Gulf Power with just compensation. The Bureau relied upon the Commission's prior ruling that the Cable Formula, together with the payment of make-ready expenses, provides remuneration that *exceeds* any "just compensation" due to Gulf Power from Complainants' cable attachments. *Florida Cable Telecommunications Ass'n, Inc., et al. v. Gulf Power Co.*, 18 F.C.C.R. 9599 (rel. May 13, 2003) ("Bureau Order"). The Bureau relied on the full Commission's decision in *Alabama Cable Telecommunications Ass'n v. Alabama Power Co.*, 16 F.C.C.R. 12209 (2001). *See Alabama Cable Telecommunications Ass'n v. Alabama Power Co.*, Order, 16 F.C.C.R. 12209, 12223-36, ¶¶ 32-61 (2001) ("APCo Review

Order”). The Commission’s ruling in the *APCo Review Order* was upheld by the United States Court of Appeals for the Eleventh Circuit in *Alabama Cable Telecommunications Ass’n v. Alabama Power Co.*, 311 F.3d 1357 (11th Cir. 2002)(“*Alabama Power*”).

In *Alabama Power*, the Eleventh Circuit, guided by the bedrock principle that “just compensation is determined by the loss to the person whose property is taken, 311 F.3d at 1369, concluded that, because Alabama Power (a subsidiary, along with Gulf Power, of the Southern Company) had not even alleged, much less shown, that it had incurred an actual loss or a quantifiable lost opportunity cost, it “had no claim.” *Id.* at 1370. The Eleventh Circuit concluded that, absent such a showing supported by evidence for specific poles, payment of a pole owner’s “marginal costs provides just compensation,” and, notably, the court observed that the Commission’s Cable Formula provides “*much more* than marginal cost.” *Id.* at 1370 and n.23 (emphasis added). The Eleventh Circuit further held, that, as a constitutional matter:

[B]efore a power company can seek compensation above marginal cost, it must show with regard to each pole that (1) the pole is at full capacity and (2) either (a) another buyer of the space is waiting in the wings or (b) the power company is able to put the space to a higher-valued use with its own operations. Without such proof, any implementation of the Cable Rate (which provides for *much more than marginal cost*) necessarily provides just compensation.

Id. at 1370-71 (emphasis added).

Following the Eleventh Circuit’s decision, Gulf Power filed a Petition with the Bureau seeking reconsideration and a “full evidentiary hearing” to allow it “an opportunity to meet the new standard” set forth in *Alabama Power*. See *Hearing Designation Order*, ¶ 4. Before ruling on Gulf Power’s Petition, the Bureau asked Gulf Power to file a description of the evidence that it wished to submit for consideration in response to the Alabama Power standard. On January 8, 2004, Gulf

Power filed its “Description of Evidence Gulf Power Seeks To Present In Satisfaction Of The Eleventh Circuit’s Test” (“Description of Evidence”).

In its Description of Evidence, Gulf Power indicated that it would proffer: (1) evidence of pole change-outs to accommodate new attachments of telecommunications carriers over unspecified years (some for 1998-2002) along with evidence that some of these new telecom attachers pay an “unregulated rate” for pole space on some poles; (2) evidence of make-ready for telecommunications carriers and different cable operators that have paid for change-outs of unspecified poles over an unspecified period of time; (3) load studies and business plans addressing the potential impact of third-party attachments and Gulf Power’s changing-out of poles for its own core service needs; (4) evidence depicting what crowded poles look like; and (5) evidence regarding what Gulf Power terms “an unregulated market for pole space”; and (6) unspecified “other” evidence.

After receiving Gulf Power’s Description of Evidence, the Bureau initiated this proceeding to afford Gulf Power a hearing “to present the evidence delineated in its Description of Evidence.” *Florida Cable Telecommunications Ass’n, Inc., et al. v. Gulf Power Co.*, Hearing Designation Order, EB Docket No. 04-381, DA 04-3048 (rel. Sept. 27, 2004) (hereinafter “*Hearing Designation Order*”). The Bureau’s *Hearing Designation Order* specified that the “issue” for the hearing would be: “Whether Gulf Power is entitled to receive compensation above marginal costs for any attachments to its poles belonging to the Cable Operators, an, if so, the amount of any such compensation.” *Id.* at ¶ 11. The *Hearing Designation Order* clearly stated that Gulf Power “bears the burden of proceeding with the introduction of evidence and the burden of proving it is entitled to compensation *above marginal cost* with respect to *specific poles*.” *Id.* at ¶ 8 (emphasis added).

On October 20, 2004, Complainants filed a Petition for Clarification, seeking, *inter alia*, the definition of important ambiguous terms, an examination of the “evidence” proffered by Gulf Power in its Description of Evidence, and a finding regarding the extent to which the Cable Formula already provides Gulf Power with compensation in excess of the marginal costs of pole attachments. However, the Presiding Judge deferred any ruling and required the submission of Preliminary Statements on Alternative Cost Methodology. On December 3, 2004, in their Preliminary Statement on Alternative Cost Methodology, Complainants pointed out that, in order to meet its burdens of production and persuasion, Gulf Power would have satisfy the standards set forth in *Alabama Power*; that the Cable Formula already provides “just compensation”; and finally, that Gulf Power’s claims do not warrant the use of any “alternative cost methodology.”

Consistent with *Alabama Power*, because Gulf Power already receives “much more than marginal cost” under the Commission’s Cable Formula rate, 311 F.3d at 1370-71, Gulf Power would have to show an actual loss or specific, quantifiable lost opportunity (that it was “out . . . more money” as a consequence of Complainants’ attachments, 311 F.3d at 1369) with respect to each pole for which it seeks a constitutional entitlement to an annual rate higher than its existing compensation under the Cable Formula. In order to discover what evidence, if any, Gulf Power has that would satisfy the strict requirements of *Alabama Power* and the Hearing Designation Order, Complainants served Gulf Power with 48 Interrogatories and 35 Document Requests.

On April 15, 2005, shortly before Gulf Power served its responses, the Presiding Judge issued an Order stating that Complainants’ discovery requests “appear on their face to constitute fair questions to pose to Gulf Power, the party seeking a substantial increase in monetary rent” *FCC Order* 05M-23 at p. 8, and also “appear designed to flush out the proof” that had been described in Gulf Power’s Description of Evidence, *Id.* at p. 9. The Court also noted that Complainants’

discovery requests “should be answered and not avoided or deferred needlessly to the completion of the Pole Attachment Survey in the fall.” *Id.* at p. 8. Indeed, “Gulf Power is expected to have authentic and reliable proof to back up its proffer.” *Id.* Accordingly, the Court directed that “existing evidence related to the Description of Evidence must be produced to the Bureau and the Complainants in discovery” and that the ongoing survey “does not excuse Gulf Power from providing complete interrogatory answers with respect to the proof it had on January 8, 2004, that relate to its Description of Evidence.” *Id.* at pp. 7, 8.

ARGUMENT

The Commission’s rules provide that ‘parties to an administrative adjudication may serve Interrogatories and Documents Requests “for the discovery of relevant facts, for the production and preservation of evidence for use at the hearing, or for both purposes.” Furthermore, “Persons and parties may be examined regarding any matter, not privileged, which is relevant to the hearing issues, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts.” Parties may not refuse to answer discovery requests on the ground that the information sought “will be inadmissible at the hearing if the [information] sought appears reasonably calculated to lead to the discovery of admissible evidence.” 47 C.F.R. § 1.311(a) and (b).

These principles apply in this case. Gulf Power has provided many evasive and incomplete answers and has stated objections which are not well taken. Complainants move to compel Gulf Power to provide more responsive and complete answers to both Complainants’ Interrogatories and Document Requests. The individual discovery requests and Gulf Power’s answers are discussed below:

I. GULF POWER'S RESPONSES TO MANY INTERROGATORIES ARE EVASIVE AND INCOMPLETE

Interrogatory No. 2:

Identify your definition or understanding of the phrase "full capacity" within the meaning of the *Alabama Power v. FCC* standard, and identify and define any differences between your use or understanding of "full capacity" and the terms "crowded" or "lack of capacity." In addition, identify with specificity the basis upon which You propose to quantify or measure "full capacity" for an individual pole. Provide any applicable citation to safety codes, specifications, agreements or economic or regulatory literature that supports your response.

Gulf Power Response:

Gulf Power understands the phrase 'full capacity' (as used in *APCo v. FCC*) to mean a pole that cannot host further communications attachments, consistent with Gulf Power's own core use, the NESC, existing contractual obligation, and sound engineering practice, without expansion or addition of facilities (including cross-arms, guy wires, etc.). Gulf Power understands the term 'crowded' to mean a pole that is close to being at 'full capacity' – in other words, a pole with room for only one additional communications attachment. For the purposes of this proceeding only, Gulf Power proposes to measure the visually identifiable, physical 'crowding' or 'full capacity' as set forth in the Osmose Statement of Work. * * *

Complainants' Argument:

Gulf Power's response is inadequate for several reasons. First, Gulf Power fails to answer Complainants' question about how Gulf Power proposes to quantify or measure "full capacity" for an individual pole. Instead, Gulf Power wrongly equates "crowding" with "full capacity" and merely refers to the Statement of Work it signed with its consultant, Osmose, which also improperly equates a "crowded" pole with a pole at "full capacity." See Osmose Statement of Work, p. .4 of 20, attached to Gulf Power's March 23, 2005 Motion for Extension of Time. In the April 15, 2005 Order, the Presiding Judge specifically noted that "the term 'pole crowding' is ambiguous"; that the Eleventh Circuit ruled there is no right to consider more than marginal costs unless a pole is at "full capacity"; and that the relevant foundational issue in this case involved a determination of which specific poles, if any, are at "full capacity." Because the *Alabama Power* test requires, as its first

prong, a showing of particular poles that are at “full capacity,” 311 F.3d at 1370-71, Complainants are entitled to an explanation from Gulf Power as to how exactly it proposes to quantify or measure “full capacity” on individual poles.

Second, Gulf Power’s response to Complainants’ question about Gulf Power’s definition of the term “full capacity” is itself evasive and incomplete. A responsive and complete answer would provide a complete description of the instances in which, because of various factors, no additional attachment to a particular pole were physically possible. But, instead, Gulf Power’s answer refers to “a pole that cannot host further communications attachments, consistent with Gulf Power’s own core use [and other factors].” Putting aside the propriety of measuring a pole’s “full capacity” only by reference to “communications” attachments, as opposed to *all* attachments, *see Alabama Power*, 311 F.3d at 1370, Gulf Power’s answer is inadequate because it incorporates the unqualified and undefined phrase “consistent with Gulf Power’s own core use.” The phrase is not explained by any reference to physical attributes of a utility pole or even the time of an assessment of a pole’s capacity (present or future). In effect, as is seen in its answer to Complainants’ next Interrogatory, Gulf Power is seeking to use the phrase “consistent with [its] own core use” to ensure that each of its poles, or as many of them as possible, are deemed to be at “full capacity.” This sort of unqualified reservation in answering a foundational issue is clearly improper.

Interrogatory No. 3:

For the pole attachments identified in response to Interrogatory No. 1, identify, for each cable operator Complainant for the period from 2000 through the present: the total number of Gulf Power poles that You contend were, are, or have been at “full capacity” within the meaning of the *Alabama Power v. FCC* standard; the location and individual pole number of the specific poles You contend were, are, or have been at “full capacity;” the specific period of time You contend the poles You identified were, are, or have been at “full capacity;” and the specific reason or reasons why You contend such poles were, are, or have been at “full capacity.”

Gulf Power's Response:

Gulf Power contends that all poles identified in response to interrogatory number 1, at all times, since 2000, were either "crowded" or at "full capacity." For the purposes of this proceeding, Gulf Power has contracted with Osmose to perform an audit of its poles to ascertain crowding band [sic] on vertical clearances. Following completion of the audit, Gulf Power will supplement this response to identify those poles meeting the definition of "crowded" as used in the Osmose Statement of Work.

Complainants' Argument:

Gulf Power's answer is evasive, incomplete, and inconsistent with both Alabama Power's focus on a showing of "full capacity" for "each pole" and the Presiding Judge's reiteration of that standard in the April 15, 2005 Order. April 15, 2005 Status Order, 4. In particular, Gulf Power fails to identify a single individual pole that is at "full capacity." Instead, Gulf Power simply asserts that "all poles," ranging from 2000 to the present, have been either "crowded" or at "full capacity." This response is contrary to the *Alabama Power* test, which requires evidence "with respect to specific poles," 311 F.3d at 1370-71, and the April 15th Order, which reiterates that Gulf Power has the burden of producing evidence of "full capacity" for "specific poles" and directs the parties not to use the ambiguous term "crowding." It is also inappropriate for Gulf Power to say that it will only identify "poles meeting the definition of 'crowded'" when its pole "audit" is completed. Gulf Power contended, in its January 8, 2004 Description of Evidence, that it had evidence of situations requiring additional work "due to full capacity." See Description of Evidence, 3. Complainants are entitled to a complete response that identifies, as of the time period applicable to the current dispute, which is 2000-2001, not 2005, each of the specific, individual poles that Gulf Power contends are at "full capacity," as reflected in its claims in its Description of Evidence.³ As the Presiding Judge

³ The Complainants initiated the underlying proceeding on July 10, 2000. At issue were pole rents that Gulf Power purported to charge for 2000-2001, and its claim at that time that, in order to avoid Gulf Power's threatened termination of Complainants' pole attachment contracts, Complainants would have to exercise a statutory right of access under 47 U.S.C. § 224(f). By virtue of its Description of Evidence and its effort in this hearing to obtain

stated, "such questions should be answered and not avoided or deferred needlessly to the completion of the Pole Attachment Survey in the fall." April 15, 2005 Order, 8.

In addition, Gulf Power has failed to answer important parts of Interrogatory No. 3. Complainants reasonably asked for the location and individual pole number of poles Gulf Power claims to be at "full capacity," as well as the specific reason or reasons why Gulf Power so contends. Gulf Power has provided no answer whatsoever regarding pole locations, numbers, and reasons for alleged "full capacity."

Interrogatory No. 4:

For the poles identified in response to Interrogatory No. 3 which You contend were, are, or have been at "full capacity," identify, for each year from 2000 through the present and for each cable operator Complainant, the number of such poles for which You contend that Gulf Power had or has "waiting in the wings" "another buyer of the space" occupied by Complainants' attachments or some other space on Gulf Power poles; identify all such "buyers;" identify the period of time when they were, are, or have been "waiting in the wings" and explain Gulf Power's understanding of the term "waiting in the wings;" identify what rate or compensation such other buyer was, is, or has been ready, willing, and able to pay to Gulf Power for access to the space occupied by Complainants' attachments or some other space on Gulf Power poles; identify whether such other buyer has obtained an attachment to Gulf Power poles and, if so, how such attachment was accomplished; and whether the pole you assert was at "full capacity" was or was not replaced or substituted and the reasons therefore.

Gulf Power's Response:

Gulf Power understands the phrase "waiting in the wings" (as used in *APCO v. FCC*) to be figurative, insofar as requiring identification of an actual buyer would completely reject the hypothetical "willing buyer" standard and thus be at odds with more than 100 years of United States Supreme Court jurisprudence. In each instance where Gulf Power has changed-out a pole for capacity reasons to accommodate a new attacher, a "buyer" had been "waiting in the wings" for space on a "crowded" or "full capacity" pole. Sometimes those buyers have been ready, willing and able to pay the Cable Rate; sometimes the Telecom Rate; and sometimes

rentals above marginal costs predicated upon "just compensation" under the takings clause, Gulf Power must produce evidence of its losses *at the time of the taking*, not now. See generally *United States v. Clarke*, 445 U.S. 253 (1980) ("value of property taken by a governmental body is to be ascertained as of the date of taking"); see also *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) ("the amount of the award is measured by the value of the property at the time of taking, not the value at some later date").

a market rate. The most prominent instance of such occurrence is in the context of major build-outs. (See Gulf Power's January 8, 2004 Description of Evidence).

Complainants' Argument:

Gulf Power's response is evasive and incomplete. The Eleventh Circuit in *Alabama Power* required a specific showing, for "each pole" at "full capacity" that the pole owner had "another buyer of the space" "waiting in the wings." This requirement is not "figurative," but literal and actual. As *Alabama Power* makes clear, the pole owner must prove, with respect to this part of the test, that it had a higher valued offer from another entity that resulted in either an actual loss (the pole owner's being "out any more money") or a specific lost opportunity (cable operators' attachments "foreclos[ing] an opportunity to sell space to another bidding firm"). See 311 F.3d at 1370. If Gulf Power cannot provide such evidence, then it must say so and recognize that it cannot satisfy one of only two prongs under which it could meet the *Alabama Power* test (the other being a specific higher valued use to which the power company could put the space occupied by Complainants' cable attachments). Gulf Power's answer to Interrogatory No. 4 refers generally to "buyers" but fails to identify a single such buyer, let alone a party willing to pay more than Complainants' pay for the space occupied by Complainants on specific poles who was not able to be accommodated by Gulf Power. Gulf Power's also uses the phrase "sometimes" in combination with unspecified "buyers," without any specifics as to the identity of a pole lessee, an actual rate, or specific poles.

In its Description of Evidence, Gulf Power alleged that there is "an unregulated market for pole space" and implied that it has evidence that "fits within part (2)(a) of the [*Alabama Power*] test" regarding specific lost opportunity costs. See Description of Evidence, 7-8. As the Presiding Judge has stated, the fact that Gulf Power may one day assemble more purported evidence "does not excuse Gulf Power from providing complete interrogatory answers with respect to the proof it had

on January 8, 2004, that relate[s] to its Description of Evidence.” April 15, 2005 Order, 8. In answering this Interrogatory, Gulf Power has the obligation under *Alabama Power* to identify specific instances, where it claims it either experienced an actual monetary loss or a specific, quantifiable lost opportunity to charge a higher pole rate to a third party, that it alleges was caused by its having to allow Complainants’ cable attachments on its poles.

Interrogatory No. 5:

For the poles identified in response to Interrogatory No. 3 which You contend were, are, or have been at “full capacity” and for which You have not had “another buyer of the space” “waiting in the wings” as specified in response to Interrogatory No. 4, identify, for each year from 2000 through the present, and for each cable operator Complainant, all poles, by total number, and individual pole number and location, for which You contend Gulf Power was, is, or has been willing, during the period from 2000 through the present, to put the space occupied by Complainants to a “higher valued use with its own operations;” identify what that “higher valued use” was, is, or has been; identify how and why such use is of a “higher value” than the make-ready and annual per-pole compensation received by Gulf Power from Complainants; and quantify the difference between the make-ready and annual per-pole compensation paid by Complainants to Gulf Power and the “higher value” that You claim. Provide any applicable citation to economic or regulatory literature that supports your response.

Gulf Power’s Response:

Gulf Power objects to the first half of the question on the grounds that it is vague, ambiguous, and impossible to understand. Subject to and without waiving this objection, Gulf Power believes that any space occupied by a cable company can be put to a “higher valued use.” The space can be reserved for sale to players in the burgeoning Telecom market; the space can be reserved for non-regulated communications attachers; the space can be used for Gulf Power’s own communication use (or that of its affiliates). From Gulf Power’s perspective, merely forcing the cable companies to develop their own infrastructure, rather than freeloading on Gulf Power’s facilities, is itself a “higher valued use.” This is especially true in light of the Enforcement Bureau’s trend towards operational micro-management and evisceration of conventional commercial contract protections (See, e.g., CTAG).

Complainants' Argument:

Gulf Power's partial objection is not well-taken, and its response is evasive and incomplete. First, the question simply and straightforwardly asks Gulf Power what evidence it has that it can meet the *Alabama Power* test (part (2)(b)). It is not vague, ambiguous, or even difficult to understand. Gulf Power claimed in its Description of Evidence that it had evidence of "the 'higher-valued use' element in part (2)(b) of the Eleventh Circuit's test." Description of Evidence, 6. It is obliged to identify all such evidence, and provide the "proof it had" as the Presiding Judge has directed, see April 15, 2005 Order, 8; it may not try to dodge the question with a spurious objection.

Second, Gulf Power's answer is both incomplete and inconsistent with *Alabama Power* and other judicial precedent. Gulf Power, using the same cavalier, general answer it has in answers to other interrogatories, asserts that "any space" used by cable attachers "can be put to a 'higher valued use.'" This fails to comply with *Alabama Power*'s requirement of a specific showing "for each pole" of a "missed opportunity" in the form of "proof" that the power company was denied specific opportunities to put space occupied by Complainants to a higher valued use. *See Alabama Power*, 311 F.3d at 1370-71.

Under *Alabama Power*, moreover, the issue under part (2)(b) of the test is not whether pole space hypothetically "can be reserved" or "can be used" for some unspecified, purported higher valued use in Gulf Power's subjective opinion but whether pole space occupied by Complainants' attachments actually caused Gulf Power to incur a "missed opportunity" on specific poles to put space to an identifiable, specific, and quantifiable higher valued use of its own. In its answer, Gulf Power loosely refers to the concept of "reserving" pole space and postulates hypothetical reservations, but any such reservations are narrowly limited by applicable

judicial precedent. Specifically, in *Southern Co. v. FCC*, 293 F.3d 1338, 1348-49 (2002), the Eleventh Circuit upheld an FCC guideline limiting utilities' reservation of pole space to reservations done pursuant to a bona fide development plan to use the space in core utility service, and another guideline requiring utilities to permit attachers to use reserved space until the utility demonstrates an actual need for the space. Therefore, whether or not space "can" be reserved is irrelevant. As the Eleventh Circuit made clear in *Alabama Power*, a pole owner must show an actual, quantifiable, higher-valued use for specific space on specific poles. 311 F.3d at 1370-71. If Gulf Power can make such a showing, it is obligated to produce such evidence now in response to Complainants' discovery. If it cannot, it has a duty to concede the issue now.

Finally, Gulf Power's answer is improper as a matter of law to the extent that it contends that "forcing the cable companies to develop their own infrastructure" is a higher-valued use. Of course, this contention is not a specific, actual, quantifiable higher valued use. But more importantly, the contention is one of law that was clearly rejected in *Alabama Power*. The theory underlying Gulf Power's contention is that cable company attachers obtain a gain, or benefit, by their attachments, and that the utility ought to be compensated under the Fifth Amendment by the amount of the benefit obtained by attachers in not having to build their own duplicative set of utility poles. But, as the Eleventh Circuit explained:

[I]n takings law, just compensation is determined by the loss the person whose property is taken. . . . Put different, 'the question is, What has the owner lost? Not, What has the taker gained?'

311 F.3d at 1369 (internal citations omitted). The bottom line is that, Gulf Power has identified no actual lost opportunity or missed opportunity to put space occupied by Complainants' attachments to a higher valued use. Gulf Power may not be permitted to dodge the issue – it must either admit that this is the case or identify each specific instance that it claims it suffered

such a lost opportunity and identify the difference between all the monies paid by Complainants in such instances and the “higher value” that Gulf Power claims.

Interrogatory No. 7:

For all of the poles that You identified in response to Interrogatories 4 and 5, identify the marginal costs to Gulf Power of each of cable operator Complainants’ attachments for which You claim a right to compensation at a rate greater than that under the FCC formula plus make-ready.

Gulf Power’s Response:

Gulf Power contends that its marginal costs for each CATV attachment are equal to what the cable formula (plus a charge for grounds and arrestors) yields.

Complainants’ Argument:

Gulf Power’s answer is evasive and incomplete, and, insofar as it attempts to equate “marginal costs” of cable attachments with the monies it receives through make-ready and annual FCC Cable Formula pole rents, legally incorrect as a matter of law. In *Alabama Power*, the Eleventh Circuit made clear several times that a pole owner receives not just “marginal costs” under the FCC Cable Rate payments but rather “much more than marginal cost.” 311 F.3d at 1369, 1370-71. Further, the Eleventh Circuit explained that “marginal costs” consist of “any make-ready costs” incurred by a pole owner during the attachment process that are caused by Complainants’ attachments and any other incremental costs that can be proven to be specifically related to the cable operators’ attachments. See 311 F.3d at 1368-69 (discussing make-ready, maintenance costs, and the opportunity cost of capital devoted to make-ready and maintenance costs). Accordingly, Gulf Power has a duty, under *Alabama Power* not to hide behind a legal argument that has already been rejected but to identify its actual expenses specifically tied to Complainants’ attachments on each pole. In other words, Gulf Power has the burden to identify, for each pole that it claims meets the

Alabama Power requirements, a specific marginal cost amount that is directly caused by Complainant's attachment on that pole.

Interrogatory No. 8:

For all of the poles that You identified in response to Interrogatories 4 and 5, identify every attaching entity other than Complainants attached to each such pole; describe how many attachments on each such pole those other attaching entities have had or have, when such attachments commenced, and where those attachments are located on each pole; and state the make-ready and annual per-pole compensation received by Gulf Power from each attaching entity other than Complainants (including any Gulf Power affiliates). Specifically identify the number of attaching entities paying Gulf Power annual compensation under the FCC's telecommunications rate formula (47 U.S.C. § 224(e) and implementing regulations).

Gulf Power's Response:

Gulf Power will supplement this response upon completion of the Osmose audit.

Complainants' Argument:

Gulf Power's response is unacceptably incomplete. While Gulf Power states that it will "supplement" its response after the completion of its consultant's pole survey, it provides no substantive response whatsoever now. This is improper, because Gulf Power should have a substantial amount of information responsive to this request. First, Gulf Power ought to know the name of the entities attached to the same poles that Complainants are attached to. Surely Gulf Power sends bills to these entities too. It has a duty to identify them, particularly since Gulf Power cannot meet the first "full capacity" prong of the Alabama Power test without identifying the parties on its poles. Gulf Power also should have records, based upon, for example, its 2001 Pole Count (see its Response to Complainants' Interrogatory No. 1), that provide information about how many attachments are on each pole to which Complainants are attached, when those attachments were

made, and where they are located. In its January 8, 2004 Description of Evidence, Gulf Power claimed that it had “evidence concerning make-ready work” for other attachers and “photographic and engineering evidence depicting attachment arrangements on distribution poles.” Description of Evidence, 5-6. Complainants are entitled to such information, and, specifically, to have Gulf Power itself review such information and answer this Interrogatory.

Second, Gulf Power must have information about its make-ready costs that it has charged to other attachers and the annual per-pole compensation that it has charged to such other attachers, including which attachers pay compensation under the FCC’s Telecommunications Rate. Indeed, in its January 8, 2004 Description of Evidence, Gulf Power claimed that it had evidence concerning other attachers’ payment of both the Telecom Rate and of allegedly “unregulated” rates. Description of Evidence, 3, 8.

As the Presiding Judge stated in his Order of April 15th, questions such as Interrogatory No. 8 “should be answered and not avoided or deferred needlessly to the completion of the Pole Attachment Survey in the fall.”

Interrogatory No. 9:

Identify quantify, and explain the basis of any actual loss (income or other revenue) that Gulf Power contends that it has experienced from 2000 to the present, which it alleges was caused by attachments of cable operator Complainants (and explain in your answer how the alleged actual losses are or will be proved, including any reliance upon Gulf Power’s specifications, accounting records, engineering documents, or testimony)

Gulf Power’s Response:

From 2000 to the present, Gulf Power’s actual loss is measured by the difference between the rate paid by complainants and just compensation, plus interest at the maximum allowable legal rate. Gulf Power is not claiming as damages any actual loss other than the difference in rates, plus interest.

Complainants' Argument:

Gulf Power's response is evasive, incomplete, and inconsistent with *Alabama Power*. In *Alabama Power*, the court made clear that a pole owner who claimed a constitutional right to payment greater than that already provided under the FCC's Cable Rate must show that it was "out . . . more money" and/or that it could identify and quantify one or more "missed opportunities" as a result of having to accommodate cable operators' attachments. See 311 F.3d at 1369-71. Under *Alabama Power*, actual loss refers to actual income or other revenue that Gulf Power has lost that was caused by Complainants' attachments – i.e., greater money offered by a third party that could not be accommodated on Gulf Power's poles or a distinct, quantifiable, actual, and current higher valued use of Gulf Power's own for the same space occupied by Complainants. Gulf Power can't just claim that its "actual" loss is the difference between what they receive and what they want, hypothetically, under just compensation. Gulf Power lost that argument in *Alabama Power*. See 311 F.3d at 1369. Moreover, evidence of losses and lost opportunities is not dependent upon the physical pole inspection that is consultant Osmose is conducting. Gulf Power must produce its evidence of any actual losses and lost opportunities and provide specific numerical calculations to support its claimed losses, or admit that they have none and have their claims dismissed immediately.

Interrogatory No. 10:

For all of the poles that You identified in response to Interrogatories 4 and 5, identify the precise rate (*i.e.*, in dollars and cents) that You contend constitutes a "just compensation" annual pole attachment rental rate for Complainants' attachments and specify the poles, by number and location, for which you are seeking that rate and the basis and method of calculating that rate.

Gulf Power's Response:

Gulf Power contends, and has contended since 2000, that \$40.60 is the annual just compensation rate. Gulf Power is considering seeking other alternative rates based

on the calculations of its valuation experts. Gulf Power expects each of these alternative rates to be less than \$40.60. Gulf Power will identify the precise [sic] and methodology upon disclosure of its valuation experts according [to] the December 17, 2004 Order. Gulf Power will identify the specific poles for which it seeks a higher rate after completion of the Osmose audit.

Complainants' Argument:

Gulf Power's response is evasive and incomplete. It is entirely unreasonable for Gulf Power to proffer what it labels as "just compensation" pole rate and then refuse to provide any substantive information about the "basis and method of calculating that rate," as Interrogatory No. 10 asked. Gulf Power must have current information about how it gets to a rate of \$40.60, some 8 to 10 times the current rate paid under FCC regulations, or it would not proffer such an extraordinary figure. It is particularly outrageous for Gulf Power to suggest that it will not identify the basis and method of calculating its rates until the end of this year. Apparently, Gulf Power hopes that, by refusing to substantiate its claims for its purported "just compensation" rate until the close of discovery, Complainants will be foreclosed from conducting fact discovery into the details and bases underlying Gulf Power's claims.

In addition, as Gulf Power notes, it says that it "has contended since 2000" that \$40.60 is its "just compensation" rate. Accepting this at face value, Gulf Power then has the burden to specify, *in this proceeding, by answering this Interrogatory*, all of the facts and details constituting the basis and method for its calculations leading to this figure.

Finally, while Gulf Power claims that it will "identify specific poles for which it seeks" the \$40.60 rate "after the Completion of the Osmose audit," Gulf Power must have some knowledge now, based upon its January 8, 2004 Description of Evidence, of which poles it intends to claim qualify for the rate of \$40.60. For example, Gulf Power stated that it "seeks to introduce documentary evidence (agreements, invoices remittances, etc.) and testimony showing that other

attaching entities are voluntarily paying an annual pole attachment charge of \$40.60. More than 2,200 attachments are invoiced and paid at the \$40.60 charge.” Putting aside for now the question of whether other parties’ payments at rates greater than the FCC Cable Rate are depriving Gulf Power of any “missed opportunity” that may be attributed to Complainants, Gulf Power should be required to identify the “documentary evidence” to Complainants of which it speaks; to identify which poles have attachments paying the purported charge of \$40.60; and to identify the basis and method of calculating the claimed rate.

Interrogatory No. 11:

Identify all persons, whether or not employed by Gulf Power, who have knowledge or information referring to, relating to, or regarding Gulf Power’s factual and legal contentions in FCC Docket Numbers: P.A. No. 00-004 or E.B. No. 04-381, including Gulf Power’s contentions in its January 2004 “Description of Evidence” and its December 2004 “Preliminary Statement on Alternative Cost Methodology.”

Gulf Power’s Response:

Gulf Power objects to this interrogatory on the grounds that it is overly broad and unduly burdensome. Subject to and without waiving these objections, Gulf Power list[s] the following: [chart listing 13 names with employers]. This list excludes counsel for Gulf Power and other parties. This list also excludes Gulf Power’s experts and the personnel of its pole audit contractor.

Complainants’ Argument:

Gulf Power’s partial objection is not well-taken. This interrogatory asks, through Complainants’ use of the defined term “identify,” *see* Complainants’ Interrogatories, Definitions, ¶ 18, for the name, business telephone number, home and business addresses, employer, and title or position of persons having knowledge or information relating to Gulf Power’s claims in this case. The information requested is clearly relevant, and, contrary to Gulf Power’s claim of overbreadth and “burden,” the requested numbers, addresses, and other information are basic and should be readily locatable. In its answer, Gulf Power lists the names of thirteen (13) individuals having

knowledge but, apart from identifying their employer, provides no information about their telephone numbers, addresses, or titles. Since Gulf Power has failed to provide any reason for its claim of “burden,” it should be required to produce the requested information.

Interrogatory No. 12:

Identify all persons who provided assistance or information used in answering these interrogatories and list the corresponding interrogatory numbers for which they provided the assistance or information.

Gulf Power’s Response:

Gulf Power objects to this interrogatory on the grounds that it is unduly burdensome and vague. Subject to and without waiving these objections, Gulf Power lists the following: [chart listing seven names with employer].

Complainants’ Argument:

Gulf Power’s partial objection is not well-taken. There is nothing vague or “unduly burdensome” about identifying, with contact information, the names of the persons answering Complainants’ interrogatories or specifying which persons helped answer which interrogatories. Indeed, under FCC regulations, 47 C.F.R. 1.323(b), the answers to interrogatories are supposed to be “signed by the person making them.” Accordingly, Complainants are entitled to the requested information, including the business telephone number, home and business addresses, and title or position of the persons who assisted in answering Complainants’ interrogatories and a specification of who answered which interrogatories.

Interrogatory No. 14:

If you contend that Complainants, or any officer, director, agent, employee acting on behalf of Complainants, have made any admission, or taken or failed to take any action, that would preclude or tend to preclude Complainants from recovering under the claims they have submitted in this Action, identify and describe the substance of each such admission, action or omission, the person who made that admission or took or failed to take such action, and the person to whom such admission was made.

Gulf Power's Response:

Gulf Power does not understand complainants to be seeking recovery "under [any] claims they have submitted in this Action.

Complainants' Argument:

Gulf Power's response is evasive. Complainants initiated their Complaint in July 2000 seeking relief from Gulf Power's attempt to raise existing pole attachment rates by several fold under the guise of "just compensation." The present adjudicatory proceeding is an extension and continuation of the proceeding as initiated and framed by Complainants' Complaint.

Accordingly, Gulf Power's attempt to be cute and to evade answering this Interrogatory is improper. Gulf Power should be required to state whether it is relying upon any admission by Complainants that would purport to bar Complainants from finally resolving this proceeding in Complainants' favor.

Interrogatory No. 15:

Identify and describe every communication, whether oral, written or otherwise, between You or any of Your agents or employees, and any other person, including, but not limited to, Complainants, other cable operators, other telecommunications carriers, or any other entity attached to poles owned or controlled by You, relating to annual pole rental charges or the performance of or payment for make-ready work from 1998 through to the present on poles owned or controlled by Gulf Power.

Gulf Power's Response:

Gulf Power objects to this interrogatory on the grounds that it is overly broad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. Gulf Power further objects on the grounds that this interrogatory is intended for purposes [sic] annoyance or oppression.

Complainants' Argument:

Gulf Power's objections are not well-taken. First, because this Interrogatory focuses specifically on communications involving pole rent and makeready at the heart of the parties'

dispute, it is not overly broad, irrelevant, or improper in scope. This is particularly true, given Gulf Power's claims that it has constitutional grounds, within the standards set by *Alabama Power*, to demand higher compensation than what it already receives from Complainants, in the form of both make-ready payments and annual pole rental charges. In its Description of Evidence, for example, Gulf Power suggested that part of its grounds for demanding higher payments from Complainants would include evidence "of make-ready work" for other attachers and evidence regarding higher annual pole rental charges that it claimed it received from other parties. See Description of evidence, 4-5 and 7-8. Having alleged that it has such evidence, Gulf Power cannot now refuse to identify and produce records of the underlying communications between itself and these other attachers that pertain to such allegedly higher payments. In particular, Gulf Power cannot refuse, as it has done here, to identify *any* communications that it has had, including communications with Complainants and other cable operators and other communications attachers, when it has claims that "agreements, invoices, remittances, etc." support what it claims is "evidence regarding the existence of an unregulated market for pole space." Complainants' interrogatory, by seeking the details of communications relating specifically to Gulf Power's transactions with attaching entities "relating to annual pole rental charges or the performance of or payment for make-ready work" is directly relevant to the issues set for adjudication in this matter. Finally, Complainants' request reasonably seeks such information dating back to 1998 because Gulf Power itself, in its Description of Evidence, suggested that it had evidence dating from "1998" that was relevant to its claims for increased pole compensation. See Description of Evidence, 3.

Interrogatory No. 16:

Identify and describe all entities (including non-communications attachers) that are, or have been, attached to poles owned or controlled by Gulf Power since 1998.

Gulf Power's Response:

Gulf Power's response was to provide a chart listing 67 names of business who have attached to Gulf Power's poles but no other information.

Complainants' Argument:

Gulf Power's response is incomplete. As noted earlier, Complainants' defined the term "identify," when referring to a person other than a natural person, to call for not just the entity's name, but also the address of its principal place of business, its telephone number, and the name of its chief executive officer. *See* Complainants' Definition No. 18(a). Gulf Power has provided no information at all about the addresses, telephone numbers, or chief executives or other contacts for the 67 businesses that it claims have attached to its poles since 1998. Since Gulf Power must have records documenting these 67 companies' attachments in order to identify them, it is fair and reasonable to require Gulf Power to also identify the information it has concerning these businesses' addresses, telephone numbers, and executive contacts.

Interrogatory No. 17:

Identify and describe any surveys, audits or pole counts conducted by Gulf Power, its agents or any other person from 1996 through the present. Please specify in your answer the dates or time periods of these surveys, audits or pole counts, an explanation of their methodologies and all categories of information collected concerning attaching facilities and their ownership on the poles. In addition, please identify the names, titles and employers of all persons involved in the surveys, audits or pole counts.

Gulf Power's Response:

Gulf Power has conducted two pole counts from 1996 to the present day; they were done in 1996 and 2001. The 1996 count was done from approximately April